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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

UNITED STATES, PETITIONER,

v.

BILLY PRESTON KEATTS, ET UX.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The district court's memorandum opinion and order (App. A and B, *infra*) are not reported. The opinion of the court of appeals (App. C, *infra*) is reported at 405 F. 2d 913.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1968 (App. D, *infra*). A timely petition for rehearing was denied on January 17, 1969 (App. E, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, having found that a district court was in error in its reason for refusing to accept the report made by a commission appointed under Fed. R. Civ. P. 71A(h) in a condemnation case, a court of appeals may nonetheless affirm the district court's award, or must either adopt the commission's report or remand for further proceedings.

2. Whether a district court may change the amount of an award recommended to it by the report of a Rule 71A(h) commission without entering findings of fact and conclusions of law showing the basis for its award and the manner in which it was calculated.

RULES INVOLVED

Fed. R. Civ. P. 53(e)(2) provides, in relevant part:

> *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. * * * The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Fed. R. Civ. P. 71A(h) provides, in relevant part:

> * * * If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in

paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

In January 1962, the United States invoked the condemnation jurisdiction of the United States District Court for the Middle District of Tennessee, to acquire interests in some 1,516 acres, including approximately 140 acres (Tract 7307) of respondents' 188-acre farm, for use in the Barkley Dam and Lake Barkley Project in Tennessee. 28 U.S.C. 1358. A commission was appointed, Fed. R. Civ. P. 71A(h), to determine the issue of compensation, and found the value of respondents' farm to be $27,950 before the taking and $4,000 afterwards. Accordingly, it awarded the difference, $23,950, as just compensation.

On the landowners' objections to the report, and upon "a review of the entire record in this cause," the district court set aside the commission's findings. The alleged error was that the government had not shown that its witnesses had based their testimony as to value on the condition of the property and the state of the market at the time of the taking, the witnesses' appraisals having been made some three years after the taking. Consequently, the court believed that it was clear error for the commission to have given their testimony any weight. The court did not, however, then remand for further proceedings before the commission or seek itself to hear additional evidence; without indicating the testimony on which it relied or the means of calculation it used, it simply entered its own finding that the property had a market value,

before and after taking, of $33,000 and $3,500, respectively; it awarded the difference, a 20 percent increase over the commission's award, as just compensation. The government moved for reconsideration, which the district court denied—stating, *inter alia,* that its findings as to value had not been based on the testimony of the landowners' witnesses, insofar as they expressed ultimate opinions as to value, but giving no other hint as to the reasoning it had used in its calculations. (App. A, *infra*).

On the government's appeal to the United States Court of Appeals for the Sixth Circuit, the judgment was affirmed by a divided court. The court unanimously held that the district court had erred in its reason for rejecting the commission's award. It stated that the government's "testimony should not have been totally disregarded" (App. C, *infra*), and quoted with approval another court's holding that the deficiency the district court complained of "'goes merely to the weight of the evidence and not to the competency of the witness.'" Nevertheless, the majority concluded that the district court judge "did not *abuse his discretion* in finding that the commission's report was clearly erroneous" (*ibid.,* emphasis supplied), upheld his authority to make his own finding as to damages, and affirmed the award as made. The dissenting judge would have remanded the case "with instructions to consider this [the government's] testimony and to make an appropriate disposition." (App. C, *infra.*)

A petition for rehearing was denied without an additional opinion, again with one dissent (App. E, *infra*).

REASONS FOR GRANTING THE WRIT

The court of appeals has so far departed from the established and appropriate course of judicial proceedings in condemnation cases, and has sanctioned a like departure by the district court, as to call for an exercise of this Court's power of supervision. As in *United States* v. *Mertz,* 376 U.S. 192, this case comes to this Court after a non-jury trial, with a record completely silent as to the facts on which the award against the United States was based, or the manner in which that award was calculated. Here, however, the result is not due so much to the fault of the commission,[1] as to the failure of the district court and the court of appeals to carry out their obligations under Fed. R. Civ. P. 71A(h) and *Merz.* The case presents a question of the proper discharge of the judicial function, which is as important to the administration of condemnation cases as were the issues regarding commission proceedings discussed in *Merz.*

1. As we have noted, the court of appeals concluded that the district court judge had not "abused his discretion" in holding the commission's report clearly erroneous although the reason he had given for so holding was wrong. This is in itself a doubtful ruling. But the appellate court nowhere indicates its own view of a correct basis for failing to give effect to

[1] It may be, as the district court stated, that the commission did not show how it had arrived at its valuation of the property. If so, this was not relied upon by that court as "clear error," and the appropriate remedy under *Merz* would have been a remand for further proceedings, not the entry of an equally unenlightening award by the court.

the report of the commission. In this, the court of appeals failed to meet appropriate standards for the handling of condemnation cases.

Rule 71A(h) provides that if a commission is appointed, "its findings and report shall * * * be dealt with by the court in accordance with the practice prescribed in paragraph (2) of subdivision (e) of Rule 53." Rule 53(e)(2), in turn, provides that in non-jury actions, "the court *shall* accept the master's [*i.e.*, commission's] findings of fact unless clearly erroneous." (Emphasis supplied.) Prior to the instant opinion the courts of appeal have been unanimous in holding that unless clear error was properly found, Rule 53(e)(2) *requires* the district court to accept the commission's findings, including its recommendation as to compensation.

Thus, the Fourth Circuit, in an extensive review of the decided cases, concluded that the rule "permits modification of commission determinations *only* if the District Judge *correctly* finds such determinations *clearly erroneous*" and held that in the absence of "manifest error" by the commission in its determination of the extent to which a pond had enhanced the value of property taken, "its determination must be left undisturbed." *United States* v. *Carroll,* 304 F. 2d 300, 303, 307 (emphasis in original). To the same effect, see *United States* v. *Rainwater,* 325 F. 2d 62 (C.A. 8), where the court found it unnecessary to resolve a conflict which it perceived among the circuits regarding the standard for reviewing district court determinations that a commission had committed clear error because no such determination had been made

and the trial court was accordingly required to accept the commission's result. Thus, here, once the court of appeals determined that the district court's only assigned reason for believing the commission's report "clearly erroneous" was itself in error—whatever standard the court of appeals used to reach that decision—it necessarily followed that the district court was without authority to substitute its own notion of value for the commission's.

There is, moreover, a conflict among the circuits, as noted in *Rainwater, supra,* 325 F. 2d at 64–66, as to the standard of review to be applied in determining whether a trial court's determination that "clear error" has occurred is correct. In *United States* v. *Twin City Power Co.,* 248 F. 2d 108, 112 (C.A. 4), certiorari denied, 356 U.S. 918, the court concluded that it was required to treat the district court's finding of clear error as being, itself, a finding of fact which could only be overturned if clearly erroneous. See Fed. R. Civ. P. 52(a). Here, the court of appeals' reference to abuse of discretion appears to indicate that it has adopted a similar view. Other courts—including the Fourth Circuit in its more recent opinions—have tended to view the district court finding as one which should be affirmed only if correct. *United States* v. *44.00 Acres of Land, etc.,* 234 F. 2d 410, (C.A. 2), certiorari denied *sub nom. Odenbach et al.* v. *United States,* 352 U.S. 916; *United States* v. *Bobinski,* 244 F. 2d 299, 301–302 (C.A. 2); *United States* v. *Waymire,* 202 F. 2d 550 (C.A. 10); *United States* v. *Twin City Power Co. of Georgia,* 253 F. 2d 197, 203 (C.A. 5); and see *Carroll, supra,* 304 F. 2d at 303.

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This latter view is plainly preferable, since the district court serves only a review function in passing on the clear error question. It does not hear the witnesses, and hence is not entitled to any presumption of correctness on account of any opportunity to make credibility determinations. This view also accords with the standard of review generally applied in cases where masters' reports have been received. *Rainwater, supra,* 325 F. 2d at 64 and n. 1.

Merz is not to the contrary in its reference to the district courts' power under Rule 53(e)(2) to "modify" a commission's report. 376 U.S. at 199–200. It was settled at the time that "clear error" must appear in the commission's report to justify the district court in substituting its own findings, including findings as to value, *supra,* and nothing in the opinion suggests an intent to abandon that rule. Determination of the weight of evidence and similar matters is best vested in the factfinder which sees the property, hears the witnesses, and assesses their credibility. District judges should not be invited to give free rein to their own views as to what constitutes value in the community. Rather, the reference in *Merz* simply restates the rule accepted by the courts of appeal, that the trial court is not necessarily required to remand to the commission if it correctly finds clear error, but may then enter its own findings on the points concerned if the record provides an adequate basis to do so.

2. The extent to which district courts which have referred condemnation matters to commissions have independent authority to find facts without themselves hearing any evidence is open to question. But even

assuming that the court was free to enter independent findings, including a finding as to value, its opinion in this case is plainly insufficient.

In *Merz,* this Court discussed the requirements which must be met by commission reports. It noted that "commissioners need not make detailed findings such as judges do who try a case without a jury," since they are "laymen, inexperienced in the law." But even laymen, the Court stated, "can be instructed to reveal the reasoning they use * * *, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on." 376 U.S. at 198. Otherwise, the district court would have "no way of knowing what path the commissioners took through the maze of conflicting evidence"; conclusory findings would not normally be reviewable. (*Ibid.*). Plainly, district courts making independent findings are subject to requirements of explicitness and exposition at least as strict. *Id.* at 199 n. 3. Yet the district court's memoranda in this case leave all of these questions unanswered. That the court of appeals could nonetheless state that its own review of the record showed the award to be "fully justified" indicates a serious misunderstanding of its obligation, and the role of the district court.

The Tenth Circuit in *Merz* was similarly convinced by its independent examination of the record that the awards could be supported. 306 F. 2d 39, 42–43. This Court, however, held in that case that such examination could not take the place of findings showing the basis of an award by the initial trial body—court or commission. We submit that fair trial imposes the

same requirement when the award is fixed under exercise of the asserted power to modify the commission's report. The action of the court of appeals in affirming such a statement of a conclusion without specification of the supporting facts or method of reasoning used is inherently violative of a fair hearing. It not only fails to apprise the parties of underlying evidence credited and weighed by the factfinder but it makes judicial review an "empty form." See *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n,* 301 U.S. 292, 300, 302–305; *United States* v. *Benning,* 330 F.2d 527, 530–531 (C.A. 9).[2]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys.

APRIL 1969.

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[2] See also *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 506–508, 510–511; *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 167–168; *Carter V. Kubler,* 320 U.S. 243, 246–247; *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 81; *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 94–95.

APPENDIX A

In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Civil No. 3166

UNITED STATES OF AMERICA, PLAINTIFF

v.

1516.90 ACRES OF LAND, MORE OR LESS, SITUATED IN STEWART COUNTY, TENNESSEE, AND CECIL BOREN, ET AL., TRACT NO. 7307; BILLY P. KEATTS AND WIFE, MRS. BILLY P. KEATTS, DEFENDANTS

[Received for entry 12:30 p.m., Mar. 22, 1967, Brandon Lewis, clerk]

Memorandum

This action is before the Court on the exceptions of the defendants to the report of the Commission filed November 15, 1966, allowing as just compensation for the condemnation of Tract No. 7307 the sum of $23,950.00. The principal objections to the report of the Commission are that the Government witnesses were not shown to have had knowledge of the land on the date of taking and that the Commission failed to give proper weight to the testimony of the various witnesses who appeared before it.

The record in this cause discloses that the Government witnesses did not view the property until more than three years after the date of taking. In discussing the testimony of the Government witnesses, the report of the Commission states:

> * * * [T]he Government witnesses based their opinion upon comparable sales; however, some of the comparables used by the Government witnesses were at least ten miles from the caption property and the list one [sic] Government witness, Hubert Griffey, took his comparable sales from a list of sales furnished by the Government which he accepted at face value without determining if that were the only comparable sales available to use for the purpose of ascertaining the amount to which the landowner would be entitled in this case. Also, the Government witnesses had not viewed the property until March of 1965, more than three years after the date of the taking and it appears to the Commission from the testimony of the Government witnesses that they had not made an exhaustive inspection of the property prior to making their appraisals.

Of course, the fact that the witnesses examined the property after the date of taking does not mean that they may not testify as to the value at the time of the taking. It is, however, incumbent upon the Government to qualify its witnesses in this respect to demonstrate that their expert testimony as to value is based upon the condition of the property and the state of the relevant market at the time of taking. The burden is not upon the landowner to show that the property has undergone changes between the time of taking and the time of inspection.

In this cause it is apparent that the Commission did not give full weight to the testimony of the Government witnesses, but it does not appear how the Commission arrived at its valuation of the property. The estimations of the Government witnesses as to the value of the property taken ranged from $15,837.00 to $17,800.00. The opinions of defendants' witnesses ranged from $47,000.00 to $58,000.00.

Upon a review of the entire record in this cause, the Court is of the opinion that the finding of the Commission as to value must be set aside. Although the Commission stated in its report that the testimony of the Government witnesses is of little value, it should have disregarded it altogether for the reasons that the Government witnesses were not properly qualified, and no showing was made that their opinions were derived from a consideration of the condition of the property at the time of taking. The following excerpts from the transcript of the proceedings before the Commission indicates the view of the Commission which the Court considers as error:

> (COMMISSIONER): There is no proof in the record that it was substantially in the same condition in March of 1965, as it was in January—January 9th of 1962. And therefore, it seems like to me this fact would go, that is the fact that they appraised it in March, would go to their—credibility of their testimony rather than striking it entirely. * * * I think, in view of the fact that you [defendant] are making the motion [to strike the testimony], you would bear the burden of showing the testimony is clearly incompetent. We must consider it as being competent until proven otherwise.

This view is erroneous since the Government, if it offers expert witnesses, has the burden to qualify them so that they may be permitted to express an opinion. One essential is to show that the witnesses' opinions are based upon the relevant facts as they existed on the date of taking. The Commission, as stated, apparently gave some weight to the testimony of the Government witnesses in arriving at its valuation since no other evidence appears in the record to support it. This error would call for a remand to the Commission for further proceedings unless the record is adequate for the Court to arrive at a figure representing just

compensation. In this case, disregarding the Government's experts, the Court feels that a proper figure may be determined.

The Court has reviewed the record, giving special attention to the testimony relating to the productivity of the land taken, its location and all relevant factors and finds the fair market value of the entire Tract No. 7307 prior to the date of taking to have been $33,000.00. The fair market value of the property remaining to the landowner immediately after the date of taking is found to be $3,500.00. The landowner is therefore entitled to the sum of $29,500.00 as just compensation.

A form of judgment will be submitted sustaining the defendants' objections to the report, and allowing a recovery of compensation in conformance with this memorandum.

WM. E. MILLER,
United States District Judge.

APPENDIX B

In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Civil No. 3166

UNITED STATES OF AMERICA

v.

1,516.90 ACRES OF LAND, MORE OR LESS, SITUATE IN STEWART COUNTY, TENNESSEE, AND CECIL BOREN, ET AL.; TRACT NO. 7307—BILLY P. KEATTS, ET UX.

[Received for entry 4:15 p.m., Apr. 17, 1967, Brandon Lewis, clerk]

Order

This cause is now before the Court upon the motion of the Government for the Court to reconsider its findings as expressed in its Memorandum entered March 22, 1967. In its Memorandum, the Court disapproved the findings of the Commission in this cause and made a determination of the fair market value of the property taken by the Government based upon the record presented to it. The Government now moves for a reconsideration on the grounds that the Court's findings are not supported by the evidence and that the Court erred in failing to confirm the report of the Commission.

The Government's first position is that the defendants in this action failed to properly qualify the witnesses presented in their behalf. In addition, the Government contends that the landowner had the responsibility of showing any changes which might have

occurred on the land between the time of the taking and the time of the appraisal by the Government expert witnesses. The case of *United States* v. *Smith,* 355 F. 2d 807 (5th Cir. 1966), is cited for the proposition that the testimony of the landowners' witnesses in this cause cannot be allowed to support the Court's findings since those witnesses are claimed not to have been properly qualified. Also cited is the case of *United States* v. *Cooper,* 277 F. 2d 857 (5th Cir. 1960). These authorities, while correct in their holdings that testimony of unqualified witnesses cannot support a finding as to value, have no relevance here since the Court's findings are not based upon the testimony of the witnesses who appeared for the landowner insofar as they expressed ultimate opinions as experts as to values.

The second contention presented by the Government is that the Court erred in its finding that the Commission was clearly erroneous in basing its opinion as to the value of the property on the testimony of the Government witnesses who were found by the Court not to have been properly qualified and whose opinions were not shown to have been based on the condition of the land at the time of the taking. The Government cites the cases of *United States* v. *Johnson,* 285 F. 2d 35 (9th Cir. 1960), *United States* v. *Featherston,* 325 F. 2d 539 (10th Cir. 1963), and *United States* v. *60.14 Acres of Land,* 362 F. 2d 660 (3d Cir. 1966), for the proposition that an expert witness may testify as to the value of land at the time of a taking even though he does not examine the land until after the taking and that comparable sales are valid evidence upon which a finding as to value may be based. This contention ignores the fact that the report of the Commission indicated that the comparable sales used by the Government expert witnesses were not of great value. As the Court noted in its

Memorandum setting aside the award of the Commission, the Commission stated that the testimony of the Government witnesses was entitled to little weight.

In the opinion of the Court such testimony is entitled to no weight at all since the Government expert witnesses were not properly qualified, and no showing was made that their opinions were derived from a consideration of the condition of the property at the time of the taking. Thus, since the opinion of the Commission as to value appeared to have been arrived at by giving some weight and value to the testimony of the Government witnesses, it not appearing that the finding was based upon other evidence, the report of the Commission was clearly erroneous and was set aside. Under the circumstances present in this cause, it would be impossible to say that the Commission did not base its finding, at least in part, upon the testimony of the Government witnesses which the Court finds should not have been considered.

Finally, the Government states that the Court may not substitute its judgment for that of the Commission. In this regard it is contended that the Court is without power to increase the award in this case without holding a hearing to receive further evidence. The case of *United States* v. *Rainwater,* 325 F. 2d 62 (8th Cir. 1963), is cited for this proposition. In the *Rainwater* case, a district court opinion increasing the amount of a commission's award was set aside because the district court "rejected the findings of fact of the Commission because he disagreed with the judgment of the Commissioners and because he believed that the value of the land was greater than the amount fixed by the Commission."

The Court further stated that where the findings of the Commission were supported by substantial evidence the district court was not free to substitute its

judgment for that of the commission. In this case, however, the Court has found the report of the Commission to be clearly erroneous and not supported by substantial evidence. It is of significance that in *Rainwater* the District Judge did not have the benefit of a transcript of the evidence before the Commission, whereas in this case the opposite is true. The Court has had the benefit of the full transcript of the hearing before the Commission and the exhibits there introduced in addition to oral arguments of the respective parties. Giving full consideration to the fact that the Commission had the witnesses before it with a correspondingly greater opportunity to judge the value of their testimony based upon their demeanor, the Court is of the opinion that the Memorandum entered in this cause on March 22, 1967 must be reaffirmed and that no further hearing or remand is required to determine the amount of just compensation.

For the foregoing reasons, the Motion of the Government to Reconsider Findings should be, and the same is, hereby denied.

WM. E. MILLER,
United States District Judge.

APPENDIX C

United States Court of Appeals for the Sixth Circuit

No. 18105

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

1,516.90 ACRES OF LAND, MORE OF LESS, SITUATE IN STEWART COUNTY, STATE OF TENNESSEE, AND CECIL BOREN, ET AL., TRACT NO. 7307—BILLY PRESTON KEATTS, ET UX., DEFENDANTS-APPELLEES

[Filed Nov. 25, 1968, Carl W. Reuss, clerk]

Decided November 25, 1968

Appeal from the United States District Court, Middle District of Tennessee, Nashville Division

Before EDWARDS, McCREE, and COMBS, Circuit Judges

COMBS, *Circuit Judge:* In January, 1962, the United States filed proceedings to condemn interests in 1,516.90 acres of land for use in the Barkley Dam and Barkley Lake Project.[1] Included in this tract were some 140 acres of Billy Preston Keatts' 188-acre farm in Stewart County, Tennessee. The District Court appointed a three-member commission to try the issue of just compensation to the landowner (defendant-appellee), a procedure authorized by Rule 71A(h), Federal Rules of Civil Procedure. The commission's report awarded damages in the amount of $23,950. Exceptions to the report were filed by the appellee and, upon consideration of the record, the

[1] Public Law 83-780 (September 3, 1954).

District Judge increased the award of damages to $29,500. The Government appeals. We affirm.

The Government presented three expert witnesses who testified as to the value of the land before and after the taking. None of the witnesses saw the property in question until more than three years after the taking. On reviewing the record made before the commission, the District Judge held that the opinions of the Government witnesses should have been disregarded since they "were not properly qualified, and no showing was made that their opinions were derived from a consideration of the property at the time of taking." The Government complains that this was error.

Each of the Government witnesses was experienced in property appraisal and each based his opinion to some extent on comparable sales. The question is whether their delayed viewing of the property authorized the District Judge to disregard their testimony. We are of the opinion that this testimony should not have been totally disregarded. We would agree that the three-year delay by Government witnesses in appraising the property, and the failure of the Government to show that the condition of the property had remained unchanged since the date of taking, seriously impaired the persuasive effect of these witnesses. Even so, the witnesses were not disqualified and their testimony should have been given some weight. As the Third Circuit said in *United States* v. *60.14 Acres of Land,* 362 F.2d 660, 669 (1965): "[I]f there be a difference in the reliability of information currently received and that which is retrospectively obtained, it is a difference which goes merely to the weight of the evidence and not to the competency of the witness." See also *Denver Union Stock Yard Co.* v. *United States,* 304 U.S. 470 (1938).

There was wide disparity between the value estimates of the landowner's witnesses and those of the Government's experts. This testimony ranged as follows:

	Value		Difference
	Before Taking	After Taking	
Landowner's Witnesses:			
No. 1	$62,000	$5,000	$57,000
No. 2	61,000	3,000	58,000
No. 3	50,000	3,000	47,000
No. 4	61,000	3,250	57,750
No. 5	55,000	4,000	51,000
Government's Witnesses:			
No. 1	20,500	2,700	17,800
No. 2	19,300	3,420	15,880
No. 3	18,837	3,000	15,837

The landowner and his witnesses were all farmers and all had long familiarity with land and its productivity, but had no wide experience in real estate values and did not base their estimates on comparable sales.

The commission found the before taking value as $27,950 and the after taking value as $4,000, thus finding damages of $23,950. It is clear that the commission relied heavily upon the testimony of the Government's witnesses and gave little weight to the testimony of the landowner's witnesses. Our review of the record convinces us that, while the District Judge should not have completely disregarded the Government's witnesses, he did not abuse his discretion in finding that the commission's report was clearly erroneous.

The Government contends that, even if it should be conceded that the District Judge properly found the commission's report was clearly erroneous, he had no

authority to make his own findings as to damages. We disagree. Rule 71A(h), Federal Rules of Civil Procedure, incorporates by reference Rule 53(e)(2) which governs district court review of a master's findings and provides, in pertinent part: "The court after hearing may adopt the report *or may modify* it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." [Emphasis added.] The Supreme Court, speaking of the district court's authority in this regard in *United States* v. *Merz,* 376 U.S. 192, 199 (1964), said: "It may 'modify' the report on the basis of the record made before the commissioners * * *." See also *United States* v. *Carroll,* 304 F.2d 300 (4th Cir. 1962). We are of the opinion that on the basis of this record the District Judge, after properly finding that the commission's report was clearly erroneous, had authority under Rule 71A(h) to make his own findings and modify the report accordingly. He, of course, could not properly make a finding which was not supported by competent evidence.

It is apparent to us that the District Judge did give consideration to the testimony of the Government witnesses even though he did not accept their opinions as to value. We note the following statement in his memorandum opinion: "Upon a review of the entire record in this cause, * * *"; also this statement: "The Court has reviewed the record, giving special attention to the testimony relating to the productivity of the land taken, its location and all relevant factors * * *." Since the Government witnesses testified to the location of the land and to other relevant factors pertaining to its value, we construe the judge's memorandum to mean that he considered this testimony but gave less regard to the opinions of these witnesses as to value because of their three-year delay

in viewing the property. This is the only logical construction to place upon the judge's statements. Otherwise, he would have had before him only the testimony of the landowner's witnesses, and the lowest estimate by any of them was $47,000. Since the award to the landowner was fixed at $29,500, it must be assumed that he gave consideration to testimony justifying the lower figure. We will not indulge the presumption suggested by the Government that the District Judge plucked this figure out of thin air.

We observe in conclusion that the award fixed by the District Judge is fully justified by the record and no useful purpose would be served by a remand of the case for a mere formalistic reconsideration by the judge of a record with which he obviously is already thoroughly familiar. We also make the observation that under Rule 71A the District Judge has wide latitude to act as an impartial arbiter to protect the interests of both the landowner and the Government. We think that has been done here and we are not inclined to invoke a technical rule of procedure which would prolong this litigation without any discernible benefit to either party.

The judgment is affirmed.

McCREE, *Circuit Judge,* dissenting. I respectfully dissent from the opinion of the Court. The District Judge should not have disregarded the opinions of value expressed by appellant's witnesses. The remoteness of their view of the property should affect only the weight to be accorded their testimony and not its admissibility. Since the District Judge disregarded this testimony, he was thereby deprived of a range within which to make his own finding modifying the Commission's report. Since it was error to disregard the opinion testimony offered by appellant, I would remand with instructions to consider this testimony and to make an appropriate disposition.

APPENDIX D

United States Court of Appeals for the Sixth Circuit

No. 18105

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

1,516.90 ACRES OF LAND, MORE OR LESS, SITUATE IN STEWART COUNTY, STATE OF TENNESSEE, AND CECIL BOREN, ET AL.; TRACT NO. 7307—BILLY PRESTON KEATTS, ET UX., DEFENDANTS-APPELLEES

Before EDWARDS, McCREE and COMBS, Circuit Judges

Judgment

[Filed Nov. 25, 1968]

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX E

United States Court of Appeals for the Sixth Circuit

No. 18105

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

1,516.90 ACRES OF LAND, MORE OR LESS, SITUATE IN STEWART COUNTY, STATE OF TENNESSEE, AND CECIL BOREN, ET AL., TRACT NO. 7307—BILLY PRESTON KEATTS, ET UX., DEFENDANTS-APPELLEES

Order

[Filed Jan. 17, 1969]

Before: EDWARDS, McCREE, and COMBS, Circuit Judges

Upon consideration, appellant's petition for rehearing is denied.

Judge McCree dissenting.

Entered by order of the Court:

CARL W. REUSS,
Clerk.

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